CONSTITUTIONAL PROTECTION OF DECREES FOR DIVORCE.

THE Supreme Court of the United States has on the whole been the most highly esteemed court of the land from the professional point of view. It has occasionally delivered an opinion which was questioned by many members of the bar, as in the Dred Scott case, and the Legal Tender cases; but those decisions found strong support as well as dissent at the bar. It has remained for the present Court to astonish the whole bar of the country.

In the case of Haddock *v.* Haddock, decided April 16, 1906, the Court held that the New York courts are not compelled by the Constitution to give effect to a decree of divorce granted in Connecticut to a husband who had left his wife in New York and acquired a new domicile in Connecticut, where the wife did not appear in the Connecticut suit, and the separation occurred, as the New York court found, by fault of the husband, though the Connecticut court had found the contrary. The New York decree from which appeal had been taken granted the wife a divorce and alimony, notwithstanding the Connecticut decree; and this judgment was affirmed. The opinion was written by Mr. Justice White, with whom concurred the Chief Justice and Justices Peckham, McKenna, and Day. Mr. Justice Brown wrote a dissenting opinion, and Justices Harlan, Brewer, and Holmes concurred in his dissent; and Mr. Justice Holmes wrote a short supplementary opinion.

Before examining the decision critically, it is necessary to determine its exact extent, for its scope is much narrower than is generally realized.

In the first place, the decision is confined to the effect of the constitutional provision. It does not affect the law or the practice of the great majority of states which already as a matter of common law give effect to all decrees of divorce where the libellant was domiciled within the state granting the decree.[1] Though there is

[1] "The right of another sovereignty exists, under principles of comity, to give to a decree so rendered such efficacy as to that government may seem to be justified by its conceptions of duty and public policy." Opinion of White, J., Adv. Sheets, p. 5. "It

some doubt as to the law in a few jurisdictions, it is tolerably clear that the only states affected are New York, Pennsylvania, and the Carolinas; and none but New York are certainly affected.

Secondly, it still requires domicile of the libellant in the state of forum to give jurisdiction. Though requiring personal jurisdiction of the libellee in order that the constitutional provision may apply to the decree, the opinion still insists on the domicile of the libellant as necessary to give a decree for divorce any standing.

"As distinguished from legal domicile, mere residence within a particular state of the plaintiff in a divorce cause brought in a court of such state is not sufficient to confer jurisdiction upon such court to dissolve the marriage relation existing between the plaintiff and a non-resident defendant." [1]

Thirdly, while the Court requires in addition to the domicile of the libellant a personal jurisdiction also over the libellee, this jurisdiction may be acquired in one of three ways: (1) by actual appearance in the suit; (2) by actual domicile within the jurisdiction; (3) even where the libellee has left the jurisdiction in which the parties lived together as man and wife, he or she is still subject to the divorce courts of that jurisdiction, which is called the "matrimonial domicile." This point was elaborately laid down by the Court.

"Fifth. It is no longer open to question that where husband and wife are domiciled in a state there exists jurisdiction in such state, for good cause,[2] to enter a decree of divorce which will be entitled to enforcement in another state by virtue of the full faith and credit clause. It has moreover been decided that where a *bona fide* domicile has been acquired in a state by either of the parties to a marriage, and a suit is brought by the domiciled party in such state for a divorce, the courts of that state, if they acquire personal jurisdiction also of the other party, have authority to enter a decree of divorce, entitled to be enforced in every state by the full faith and credit clause.[3] Seventh. So also it is settled that where the domicile

. . . does not debar other states from giving such effect to a judgment of that character as they may elect to do under mere principles of state comity." *Ibid.*, p. 13.

[1] Opinion of White, J., Adv. Sheets, p. 13, citing Andrews *v.* Andrews, 188 U. S. 14; Streitwolf *v.* Streitwolf, 181 U. S. 179; Bell *v.* Bell, 181 U. S. 175.

[2] The significance of these words is not apparent. It is hardly possible that the learned judge means that the binding force of such a decree depends upon the view which another court may take of the goodness of the cause; yet if good cause is a jurisdictional question it may be examined anew in any court.

[3] Opinion of the Court, Adv. Sheets, p. 5. For this proposition the Court cited Cheever *v.* Wilson, 9 Wall. (U. S.) 108. In that case the court held that the full faith

of a husband is in a particular state, and that state is also the domicile of matrimony, the courts of such state having jurisdiction over the husband may, in virtue of the duty of the wife to be at the matrimonial domicile, disregard an unjustifiable absence therefrom, and treat the wife as having her domicile in the state of the matrimonial domicile for the purpose of the dissolution of the marriage, and as a result have power to render a judgment dissolving the marriage which will be binding upon both parties, and will be entitled to recognition in all other states by virtue of the full faith and credit clause." [1]

The effect of the decision is therefore confined to a case where the libellant abandoned the libellee wrongfully, left the matrimonial domicile, and acquired a new domicile, not shared by the libellee, in the state of forum.

"Where the domicile of matrimony was in a particular state, and the husband abandons his wife and goes into another state in order to avoid his marital obligations, such other state to which the husband has wrongfully fled does not, in the nature of things, become a new domicile of matrimony, and, therefore, is not to be treated as the actual or constructive domicile of the wife. As New York was the domicile of the wife and the domicile of matrimony, from which the husband fled in disregard of his duty, it clearly results from the sixth proposition that the domicile of the wife continued in New York. As then there can be no question that the wife was not constructively present in Connecticut by virtue of a matrimonial domicile in that state, and was not there individually domiciled and did not appear in the divorce cause, and was only constructively served with notice of the pendency of that action, it is apparent that the Connecticut court did not acquire jurisdiction over the wife within the fifth and seventh propositions; that is, did not acquire such jurisdiction by virtue of the domicile of the wife within the state or as the result of personal service upon her within its borders." [2]

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and credit clause applied to a foreign decree of divorce, rendered under precisely the circumstances of the case at bar except that the libellee in fact appeared. It was necessary, in order to distinguish the case, to rely upon this fact. The court in Cheever *v.* Wilson, however, did not notice the fact. In his opinion Mr. Justice Swayne said: "The only question is as to the reality of her new residence and of the change of domicile. . . . The proceeding for a divorce may be instituted where the wife has her domicile. The place of the marriage, of the offence, and the domicile of the husband are of no consequence." Mr. Justice White ignores the *ratio decidendi;* but in order to distinguish Atherton *v.* Atherton, 181 U. S. 155, from the case at bar, he is obliged to rely upon the *ratio decidendi* as stated by the court. This is one of many inconsistencies in the opinion.

[1] Opinion of the Court, Adv. Sheets, p. 6, citing Atherton *v.* Atherton, 181 U. S. 155.

[2] *Ibid.*, pp. 5, 6.

The scope of this doctrine is, however, broader than it might seem, since the fault of the libellant in leaving the libellee becomes a jurisdictional fact. To grant the original decree, the court must have found the libellant faultless in the matter; but in the second process the original libellee is likely to be the only party represented, and his side alone being heard, the second court will find the original libellant in fault, and therefore the court which rendered the original decree to have been without jurisdiction. This was the course of events in the case at bar.[1]

This novel and extraordinary doctrine has never before been suggested by a civilized court or author. The Supreme Court of the United States is entitled to the credit of originality, at least. The following are probably the only views held by civilized courts.

In all European countries, in all European colonies, and in Spanish America the possibility of the wife (who has not obtained a judicial separation) having a nationality, domicile, or residence apart from her husband is not recognized.[2] In most European states a divorce will be recognized only if obtained in the country to which the parties owe allegiance. In England the divorce will be recognized only when obtained at the domicile of the husband.[3] In Scotland and the countries governed by the Roman-Dutch law there is no requirement whatever of nationality or domicile, but residence of the parties for a certain time within the state is sufficient.[4] In the United States, with hardly an exception, the wife may acquire a separate domicile for the purpose of obtaining a divorce. In all but two or three states, the court of the domicile of either

[1] It is interesting to note that the same thing was true in Atherton *v.* Atherton, as will be seen.

[2] This statement is subject to certain exceptions. A few of the Protestant states of Germany, Hungary, and possibly other states, permit a wife living apart from her husband to secure naturalization and then to get a divorce; but most states refuse to recognize such a divorce as valid. De Bauffremont *v.* De Bauffremont, Dalloz, 1878, II. 1, 1878, I. 201, 2 Beale's Cases on Conflict of Laws, 99 (France); *In re* W's Marriage, 25 Clunet 385, 1 Beale's Cas. 428 (Austria). In England the court now recognizes the possibility of a wife deserted by her husband obtaining a divorce in the state where they last lived together, irrespective of his present domicile. Armytage *v.* Armytage, [1898] Pr. 178.

[3] The court has just recognized an American divorce, obtained at the wife's domicile, where the husband was domiciled in another American state which recognized the divorce, Feb. 22, '06. Armitage *v.* Attorney-General, 22 T. L. R. 306. The court, however, took occasion to reiterate the general principle that "it is the husband's domicile which decides the tribunal to try the cause."

[4] Weatherley *v.* Weatherley, Transvaal Prov. Rep. 66, 1 Beale's Cas. 420.

party is competent to grant a divorce. In New York and a few states it was held that where the parties had a separate domicile neither state could effectively divorce the parties; but this doctrine was overthrown by the Supreme Court in the case of Atherton *v.* Atherton.[1] The present doctrine, requiring domicile of the libellant in all cases and personal jurisdiction over the libellee in the peculiar sense above explained has been held nowhere.

It is now time to examine in detail the reasoning of the Court. This may be summarized thus: For a valid divorce it is necessary that the libellant should be domiciled in the state which grants the divorce; it is also necessary that there should be personal jurisdiction over the libellee in order that it should be enforceable under the "full faith and credit" clause of the Constitution; but if there is no such jurisdiction over the libellee, the divorce will be valid where granted. I propose to show that either the first or the third proposition is absolutely inconsistent with the second, and with the decision of the Court.

First: that the domicile of the libellant within the state is necessary to give validity to the decree. This proposition was already so firmly established by decisions of the Supreme Court that Mr. Justice White did not question it. But if the domicile of the libellant is required, in order to give the court a jurisdiction which will entitle its decree to extra territorial recognition, it must be that the suit is more than a mere personal suit. Jurisdiction over a plaintiff is obtained by his mere application to the court; his domicile is immaterial to jurisdiction in any personal action. If his domicile is necessary, it is for the purpose of giving jurisdiction over the subject-matter. In other words, the requirement of domicile for jurisdiction is proof that a proceeding for divorce is *in rem*. This has been recognized by every court in which the question has been raised. A status (as distinguished from a mere personal obligation) is a thing, a *res*, over which, by the general consent of civilized nations, some one state has jurisdiction; formerly all nations agreed that this was the state of domicile, but since the Napoleonic legislation and its imitation in the European states it has been on the Continent the state of allegiance.

Mr. Justice White does not agree with this view, it appears; and he repeats several times in his opinion a dilemma which, as he thinks, reduces it to an absurdity in a case where the husband

[1] 181 U. S. 155.

and wife have separate domiciles. "The only possible theory," he says,

"upon which the proposition proceeds must be that the *res* in Connecticut, from which the jurisdiction is assumed to have arisen, was the marriage relation. But as the marriage was celebrated in New York between citizens of that state, it must be admitted, under the hypothesis stated, that before the husband deserted the wife in New York the *res* was in New York and not in Connecticut. As the husband, after wrongfully abandoning the wife in New York, never established a matrimonial domicile in Connecticut, it cannot be said that he took with him the marital relation from which he fled to Connecticut. Conceding, however, that he took with him to Connecticut so much of the marital relation as concerned his individual status, it cannot in reason be said that he did not leave in New York so much of the relation as pertained to the status of the wife. From any point of view, then, under the proposition referred to, if the marriage relation be treated as the *res*, it follows that it was divisible, and therefore there was a *res* in the state of New York and one in the state of Connecticut. Thus considered, it is clear that the power of one state did not extend to affecting the thing situated in another state. . . . Nor is the conclusive force of the view which we have stated been met by the suggestion that the *res* was indivisible, and therefore was wholly in Connecticut and wholly in New York, for this amounts but to saying that the same thing can be at one and the same time in different places. . . . Here, again, the argument comes to this, that, because the state of Connecticut had jurisdiction to fix the status of one domiciled within its borders, that state also had the authority to oust the state of New York of the power to fix the status of a person who was undeniably subject to the jurisdiction of that state." [1]

In answer to this argument it must of course be admitted that the *res*, the status of the parties, is not corporeal; and if the doctrine of jurisdiction *in rem* is to be confined to tangible things there can be no jurisdiction *in rem* over a personal status. But, as we have seen, the common consent of civilized nations grants power over personal status to one proper state; in other words recognizes jurisdiction *in rem* over it. There are many other examples of the same sort of thing; jurisdiction *in rem*, for instance, over the estate of a dead man, including all his incorporeal rights. If then the jurisdiction over a status is jurisdiction *in rem*, is the jurisdiction claimed in this case open to the criticism made several times in the opinion, that the doctrine is self-destructive, because if Connecticut has jurisdiction over the marriage and can dissolve it, this

[1] Opinion of the Court, Adv. Sheets, pp. 9, 10.

amounts to preventing New York, equally a state in which a party to the marriage is domiciled, from exercising the same jurisdiction, so that giving jurisdiction to a state of domicile results in taking away the same jurisdiction from a state of domicile? Such a criticism ignores the real meaning of the word *jurisdiction*. Jurisdiction does not involve the power of continuing rights in existence, but of creating rights; its operation is positive, not negative. Both New York and Connecticut, having jurisdiction over the status of marriage, can affect it by dissolving it; but once it has been dissolved nothing is left for either to affect. The same criticism might be brought against allowing the status of a woman in New York to be affected by a marriage in Connecticut.

The third proposition is equally inconsistent with the second:

"The general rule [requiring jurisdiction over the defendant] is, moreover, limited by the inherent power which all governments must possess over the marriage relation, its formation and dissolution, as regards their own citizens. From this exception it results that where a court of one state, conformably to the laws of such state, or the state through its legislative department, has acted concerning the dissolution of the marriage tie, as to a citizen of that state, such action is binding in that state as to such citizen, and the validity of the judgment may not therein be questioned on the ground that the action of the state in dealing with its own citizen concerning the marriage relation was repugnant to the due process clause of the Constitution."[1]

To this proposition the learned judge was driven by the case of Maynard *v.* Hill,[2] which he cites. In that case the court was called upon to pass upon the validity of a statute divorcing a husband who was within the territory from a wife whom he had deserted and left in another state. The court held that the statute was within the jurisdiction of the legislature; "its jurisdiction to legislate upon his status, he being a resident of the territory, is undoubted."

No distinction was made in this earlier case between the validity of the statute within the territory and its validity everywhere; indeed, it is assumed in the case that the statute was valid everywhere and for all purposes. And it is impossible to discover any legal principle which would justify such a distinction. If the decree was valid in Connecticut, it operated to make the husband there a single man, and if he had there remarried his

[1] Opinion of the Court, Adv. Sheets, p. 4.

[2] 125 U. S. 190.

second marriage would be legal. Would Mr. Justice White say that he had two wives, one in Connecticut, the other in New York? If he went into New York, could he be compelled, as a result of a suit for restitution of conjugal rights, to live with his first wife? And if so, and he started into Connecticut with her, could he be convicted of adultery upon living with her in Connecticut? Well might Lord Penzance say, in support of the principle that domicile alone can determine jurisdiction for divorce, "An honest adherence to this principle, moreover, will preclude the scandal which arises when a man and woman are held to be man and wife in one country, and strangers in another."[1] The Supreme Court of Illinois criticised the doctrine expressed by Mr. Justice White (which is in fact the New York doctrine which was overthrown in Atherton *v.* Atherton) in language from the force of which it is impossible to escape. The parties to the proceeding were reversed: the husband having remained in New York, and the wife having obtained a domicile and a divorce elsewhere. Mr. Justice Carter said:

"The consequence was that the wife was, and on removing to New York would continue to be, a single woman, who might lawfully marry; while the husband was a married man, having for his wife one who might at the same time become or be the lawful wife of another man. We cannot regard as sound a doctrine leading to such results. We are unable to see the force of the reasoning which is used to support judicial conclusions that one of the married pair may, in one jurisdiction, by virtue of its laws, and in honest compliance with them, obtain a valid decree of divorce, which, as to the one obtaining it, is valid and binding in every state in the Union,[2] leaving such a one single, and free to remarry in any state, while the matrimonial bonds are still unsevered as to the other party, making him a bigamist should he remarry, and his children, the fruit of such remarriage, illegitimate. It would seem to be as logical to say that one of the Siamese twins might have been severed from the other without that other being severed from the one. It should not be forgotten that it is the policy of a great majority of the states, and of our own state as well, as established by legislative enactments, to grant judicial decrees of divorce to *bona fide* residents who comply with the statutory requirements where substituted service merely is had upon the non-resident party. To hold such decrees valid only within the jurisdiction granting them, or valid only as to those in whose favor they are granted, leaving the non-resident party still bound, would not only be inconsistent

[1] Wilson *v.* Wilson, L. R. 2 P. & D. 435, 442.

[2] The force of the reasoning is not impaired because we must here, in accordance with Mr. Justice White's opinion, substitute "almost every state."

with the policy of our own laws, and in violation of interstate comity, but would, when it is considered how great is the number of such decrees entered every year, eventually lead to the most perplexing and distressing complication in the domestic relations of many citizens in the different states." [1]

It has been heretofore believed that the full faith and credit clause required a state to give credit to every judgment which was valid in another state, where it was rendered. If because of lack of jurisdiction of the court the judgment was not binding in another state, it was equally void where it was rendered; for no court can create obligations by acting outside its jurisdiction. In reliance upon this accepted doctrine, the court in Ditson *v.* Ditson,[2] the leading case on the subject, held that under the Constitution all difficulties were avoided in this delicate subject.

"It may be added, that the distressing consequences which otherwise might arise from the conflict of laws and decisions upon this interesting and important subject has been wisely provided against by a clause of the Constitution of the United States, and can find a remedy under it in the Supreme Court of the United States, as the court of last resort, in cases demanding its application. By art. 4, sect. 1, of the Constitution of the United States, 'Full faith and credit shall be given in each state to the public acts, records, and judicial proceedings of every other state.' As this has been construed by the highest authority to give in every other state the same effect to a judgment or decree of a state court that it has in that in which it is rendered or passed, no serious injury can be done to the proper subjects of our judicial administration by the errors and mistakes of other courts with regard to our jurisdiction. From the nature of the topics constantly agitated before it, no court in the world is better qualified to deal with questions of general law, and especially with one involving, as that before us does, the rights of a state of the Union; and under the trained qualifications of the members of the court, as well as the constitutional power of the court itself, those properly subject to our judgments and decrees in this respect, as in all others, are quite safe, having honestly obtained them, in acting by virtue of them."

The confidence of this court, which lawyers have so long shared, has been betrayed.

If Mr. Justice White is right in requiring domicile of the libellant for jurisdiction, he is wrong in regarding jurisdiction over the libellee as essential. If he is right in saying the decree is valid in

[1] Dunham *v.* Dunham, 162 Ill. 589, 44 N. E. Rep. 841.

[2] 4 R. I. 87.

Connecticut, he is wrong in saying it is not binding in New York. His reasoning is certainly novel, and it is certainly wrong; can his conclusion nevertheless be supported? Is the decision right, that some jurisdiction over the person of the libellee is requisite?

In the first place, the authorities are almost without exception against him. The English view has already been expressed. The cases repudiate jurisdiction *in personam* as justifying a divorce in the strongest terms. He enumerates numerous American cases in which jurisdiction was based on domicile alone, and examines a few of them; the character of the examination may be judged from the fact that he classes Massachusetts (in which the English rule is most firmly established) as a state requiring personal jurisdiction over the libellee; that he sees no distinction with regard to jurisdiction between a suit for divorce and one to annul a marriage; and that he cites as cases repudiating any obligation to recognize a foreign decree cases in which the court is enforcing a local statute giving alimony or dower to a divorced wife, although in such cases the distinction is expressly made between recognizing the decree and enforcing the statute.

Mr. Justice White's treatment of the earlier decisions of the Supreme Court is equally unsatisfactory. In several cases the Court had held that domicile of the libellant was required for jurisdiction, and had refused to enforce a divorce granted in a state where neither party was domiciled.[1] In all these opinions (the last of them written by Mr. Justice White) the decision was put solely on the ground that neither party was domiciled within the state. Mr. Justice White in this case, however, requires personal jurisdiction over the party defendant. In Maynard *v.* Hill[2] the Supreme Court affirmed the decision of a territorial court, upholding the validity of a divorce granted in the territory to a man domiciled there from his wife, whom he had deserted in Ohio. Mr. Justice White distinguishes this case on the ground that this was an affirmance of the validity of the divorce in the territory only, although no such point was made in the court below. But in Pennoyer *v.* Neff,[3] which is cited in the opinion and made the basis of the decision that personal jurisdiction is necessary to give validity to a personal judgment, the question was not of enforcing the judgment in another state

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[1] Bell *v.* Bell, 181 U. S. 175; Strietwolf *v.* Streitwolf, 181 U. S. 179; Andrews *v* Andrews, 188 U. S. 14.

[2] 125 U. S. 190.

[3] 95 U. S. 714.

under the full faith and credit clause, but of upholding it in the state where it was rendered and by statute of which it was valid. The appeal in one case was from the territorial court, in the other from the federal courts of the state.

Though Maynard *v.* Hill could be thus distinguished, Atherton *v.* Atherton [1] could not, for in that case the court had held a Kentucky decree of divorce, in favor of a man domiciled there, entitled to full faith and credit under the Constitution, although the wife was domiciled in New York and never served with process. Here then was a case which could not be explained away; in order to distinguish it, the learned judge pointed out that in that case the woman had left the matrimonial domicile wrongly, as the court in Kentucky found, and was therefore still subject to the court. The difficulty with this distinction is that if her cause for leaving the domicile was a jurisdictional fact, it was open to inquiry in the New York court; and the New York court in that case, as in the case at bar, found that the wife was blameless and that the fault lay with the husband. In other words, the final distinction relied upon by Mr. Justice White in the case at bar turns out not to have existed in fact.

The difficulty on theory with Mr. Justice White's doctrine of the requirement of personal jurisdiction lies in the very nature of divorce. It is not a personal right of the parties. The express assent of both parties to a decree will not justify a court in granting the decree. The decree does not operate *in personam*, and the jurisdiction required is merely a jurisdiction *in rem*. In order to satisfy the requirement of due process of law the absent party must be given reasonable notice and an opportunity to be heard; but jurisdiction over him is not necessary.

The object of the majority was a praiseworthy one: to make objectionable divorces less easy to obtain. But in pursuit of that object they have made a decision which will have an opposite effect. For it gives an easy road to divorce where the parties are agreed in desiring it, since the libellee by appearing and suffering default can render the proceedings valid, and it thus assists collusive divorces. On the other hand, it makes it impossible to secure a divorce that will everywhere be recognized in the one case where all persons admit that a divorce should be granted, that is, where the wife elopes with an adulterer. For if she goes to another state,

[1] 181 U. S. 155.

and the injured husband obtains a divorce in her absence, the state of her new domicile need give no credit to the divorce unless it finds that the fault is with her; and as her husband is not present, and she therefore has the entire control over the evidence, she will be able to convince the court of her own innocence and her husband's fault.

The decision then is opposed to reason, to authority, and to morality; but it will stand until the question is raised again. As Mr. Justice Holmes said in his dissenting opinion, civilization will not come to an end meanwhile.

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